

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID POWELL,

Defendant-Appellant.

UNPUBLISHED
September 23, 2003

No. 239288
Wayne Circuit Court
LC No. 00-014001-01

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

Defendant was convicted of possession of over 650 grams of cocaine with intent to deliver, MCL 333.7401(2)(a), and sentenced to life imprisonment. He appeals as of right. We affirm.

Defendant first argues that his conviction should be overturned because the police stop and search of the vehicle he was driving violated the Fourth Amendment. This issue is subject to de novo review. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001). A trial court's resolution of questions of fact is entitled to deference, especially where, as here, the issue "involves the credibility of witnesses whose testimony is in conflict." *People v Burrell*, 417 Mich 439, 488; 339 NW2d 403 (1983). Testimony at the evidentiary hearing established that the state troopers who attempted to stop defendant's Ford Bronco suspected that he was not wearing his seatbelt in violation of MCL 257.710e(3). The troopers also testified that they saw the Bronco's windows were illegally tinted in violation of MCL 257.709(1)(a). Based on their observations, the troopers had a reasonable suspicion that defendant violated these two provisions of the Motor Vehicle Code; therefore, a traffic stop was a reasonable seizure. See *People v Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999) (citation omitted). A state trooper testified that defendant was arrested for fleeing and eluding the police because, when the troopers attempted to stop the Bronco, defendant drove away at a high rate of speed. See MCL 257.601a. Therefore, defendant's arrest after the pursuit was reasonable as well. *Williams*, *supra* at 612.

The trial court found that the warrantless search of the Bronco was "clearly . . . a valid search coincident to a legal arrest[,] and, if necessary, it would also be an appropriate inventory search." We agree. Defendant's arrest was lawful because the troopers had probable cause to believe, based on their own observations, that defendant attempted to flee and elude them. The

search of the Bronco and the gym bag inside the Bronco's passenger compartment was valid as a search incident to lawful arrest. *People v Bullock*, 440 Mich 15, 26; 485 NW2d 866 (1992) (citation omitted).

An inventory search is lawful if it is "conducted in accordance with established departmental procedures, which all police officers are required to follow, and [it is not] used as a pretext for criminal investigation." *People v Toohey*, 438 Mich 265, 284; 475 NW2d 16 (1991) (emphasis omitted). A state trooper testified briefly regarding state police policy for impounding the vehicles of arrestees and inventorying those vehicles' contents. He also testified that he completed a state police inventory form specifying the Bronco's contents at the time just before having the Bronco towed. The trooper's testimony established that he acted pursuant to "an established reasonable procedure for safeguarding [the] impounded vehicle[] and [its] contents." *People v Long (On Remand)*, 419 Mich 636, 648; 359 NW2d 194 (1984). It was the policy of the state police to (1) impound the vehicles of arrestees and (2) inventory the contents of those vehicles; since there was no indication the troopers deviated from this policy, the trial court did not err in finding the search of the Bronco justified on this alternative basis. Therefore, the gym bag and the nearly 5,000 grams of cocaine inside the bag were properly admitted as evidence.

Defendant next argues that the trial court abused its discretion in allowing the prosecution to cross-examine him regarding his alleged use of aliases. An unpreserved issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In order to establish plain error, a defendant must show (1) an error occurred, (2) the error was plain – i.e., "clear or obvious," and (3) the plain error affected substantial rights by prejudicing the outcome of the trial. *Id.* at 763, citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

In *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997), this Court found that "where the evidence is relevant to the witness' credibility under MRE 608 and MRE 609, such questions are proper."

Here, the prosecution's cross-examination of defendant included the following:.

Q. What did you tell the officer your name was?

A. David Powell.

Q. What is your name?

A. My name is David Powell.

Q. Really?

A. Yes.

Q. Do you ever use any other aliases, Mr. Powell?

A. Not that I recall.

The prosecution continued this line of questioning, inquiring whether defendant had used four different names.

Q. So it's possible that you have used these other names which are not your own name in the past?

A. Not that night, I haven't.

Q. I didn't ask you about that night. Is it possible in the past you have used these other names?

A. I'm here about that night.

We conclude that the prosecutor's cross-examination of defendant regarding his use of an alias in the past was probative of his credibility as a witness, MRE 608(b). Accordingly, defendant fails to show any error, much less plain error, resulting from the admission of this evidence. Furthermore, even if the evidence was erroneously admitted, defendant fails to demonstrate that the outcome of the trial was prejudiced since it is not "highly probable" that the testimony affected the verdict. *People v Murray*, 234 Mich App 46, 64; 593 NW2d 690 (1999).

Defendant next argues that the prosecution violated his right to equal protection because black prospective jurors were peremptorily challenged on the basis of their race, and that the trial court erred in denying his motion for mistrial because of this alleged constitutional violation. A trial court's ruling on a challenge brought under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), is reviewed for an abuse of discretion. *People v Ho*, 231 Mich App 178, 184; 585 NW2d 357 (1998).

A prosecutor is typically allowed to exercise peremptory challenges for any reason, but "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson, supra* at 89 (citation omitted). In order to challenge a prosecutor's allegedly discriminatory use of peremptory challenges, a defendant must show that (1) the prosecution used its peremptory challenges to exclude members of defendant's "cognizable" racial group; (2) the jury selection practice used permits discrimination by those who are prone to discriminate; and (3) any other relevant circumstances raising an inference that the prosecution excluded prospective jurors on the basis of race. *Id.* at 96. Once a defendant makes this prima facie showing, the burden shifts to the prosecution to make a race-neutral explanation for its challenges. *Purkett v Elem*, 514 US 765, 767; 115 S Ct 1769; 131 L Ed 2d 834 (1995). The court then decides whether the peremptory challenge was used in a "purposefully discriminatory manner." *Id.*, citing *Batson, supra* at 98.

The trial court did not abuse its discretion in denying defendant's motion for a mistrial because defendant failed to make a prima facie showing of purposeful discrimination. "The mere fact that the prosecutor used one or more peremptory challenges to excuse blacks from the jury venire is insufficient to make a prima facie showing of discrimination." *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). The prosecution offered an un rebutted, nondiscriminatory basis for the peremptory juror strike challenged by defendant. Moreover, defendant presents no evidence to contradict the prosecution's statement on the record that

blacks and whites were equally represented on the impaneled jury. Thus, defendant also fails to show a “pattern” of discriminatory challenges by the prosecution. *Id.*

Defendant next argues that the prosecution violated his due process rights by failing to preserve the Bronco as evidence or to otherwise provide him with access to the vehicle before trial. This issue was not raised in the trial court and is therefore unpreserved. An unpreserved constitutional issue is reviewed for plain error. *Carines, supra* at 764. In order to establish plain error, a defendant must show (1) an error occurred, (2) the error was plain – i.e., “clear or obvious,” and (3) the plain error affected substantial rights by prejudicing the outcome of the trial. *Id.* at 763, citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). We conclude that defendant has failed to show plain error affecting his substantial rights. *Carines, supra* at 763.

Where the evidence is not exculpatory, and its value is merely speculative, there is no due process violation absent a showing of bad faith. *People v Huttenga*, 196 Mich App 633, 642; 493 NW2d 486 (1992), citing *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988). In addition, where there is no bad faith shown, “a loss of evidence that occurs before a defense request for its production does not require reversal.” *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992) (citation omitted). Defendant concedes that he failed to make a pretrial request for access to the Bronco. Defendant also does not argue that the police or prosecution acted in bad faith. Instead, without any evidentiary support, defendant claims that access to the Bronco would have helped him support his theory that the police lied about the window tint, their inability to see into the Bronco, and their assertion that defendant drove the Bronco. Defendant has not shown that access to the Bronco “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998), quoting *Kyles v Whitley*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995). Absent bad faith, then, defendant’s due process claim amounts to mere speculation that is insufficient to reverse defendant’s conviction. *Huttenga, supra* at 642.

Defendant next argues that he was denied effective assistance of counsel because his attorney failed to object to the prosecution’s questions about defendant’s use of aliases, and because his attorney failed to request access to the Bronco before trial. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law” with the court’s findings of fact subject to review for clear error and the question of constitutional law subject to de novo review. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant failed at the trial court level to move either for a new trial or a *Ginther*¹ hearing, this issue is not preserved for appeal, *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996), and our review is limited to mistakes apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2002).

In order to show ineffective assistance of counsel, a defendant must show that his counsel’s representation “fell below an objective standard of reasonableness” and that “but for

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

counsel's unprofessional errors, the result of the proceeding would have been different." *People v Toma*, 462 Mich 281, 303; 613 NW2d 694 (2000). The defendant must also demonstrate that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 Mich App 294 (2001). Defendant bears the burden of overcoming the strong presumption of effective assistance of counsel. *LeBlanc, supra* at 578. Moreover, a claim of ineffective assistance of counsel cannot be premised on counsel's failure to make a frivolous motion or objection. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Because evidence of defendant's use of aliases was relevant and the value of pretrial access to the Bronco is speculative, defendant cannot establish that defense counsel's representation fell below the objective standard of reasonableness or affected in any way the outcome of the proceedings. Thus, defendant's ineffective assistance of counsel argument must fail. *Toma, supra* at 303.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage